In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case was before this Court once before as No. 586, October Term, 1950, on petition by Greenberg for a writ of certiorari to the United States Court of Appeals for the Third Circuit. On June 4, 1951, this Court granted the petition and by a per curiam decision, 341 U.S. 944, vacated the judgment of the Court of Appeals and remanded the case to that court for reconsideration in the light of *Hoffman* v. *United States*, 341 U.S. 479.

On November 15, 1951, in accordance with this mandate the Court of Appeals filed an opinion stating that it found no reason to alter its earlier conclusions (R. 245-248).

The present petition for certiorari raises all of the questions presented in the earlier petition and in addition makes the additional contention that the decision below on remand does not properly apply the decision of this Court in *Hoffman* v. *United States*. This brief will be limited to a discussion of the issues raised by this Court's *Hoffman* decision. The Court is respectfully referred to respondent's brief in opposition in No. 586, last term, for a discussion of the other issues. Since the facts are fully stated in the earlier brief, only such facts are repeated here as are necessary to the present argument.

STATEMENT

Petitioner has been convicted of contempt of court for refusal to answer three questions put to him by a grand jury. The first, which we shall refer to as the identification question, and which can be understood only in context of an immediately preceding question, was as follows (see R. 5-6):

> Q. Do you know any numbers writers around there (1133 West Diamond Street) men who are in the numbers business?
>
> A. Yes.
>
> 1. Q. Who?

A. [After consultation with counsel] I refuse to answer this question because it will incriminate me * * *.

The second and third, which we shall refer to as the telephone questions, in necessary context, were as follows:

Q. Do you make regular calls from that telephone [at 1133 West Diamond Street], since 1950?

A. Yes.

Q. Do you use that phone in connection with your business?

* * * * *

A. Not for my lawful business.

2. Q. Do you use it for any other business?

A. Well, I refuse to answer the question because it will incriminate me and I stand on my Constitutional rights * * *.

* * * * *

Q. Is it your real estate business you use it for?

A. No.

3. Q. What business do you use it for?

A. I refuse to answer the question because the answer will incriminate me. I stand on my Constitutional rights.

Somewhat later, in a hearing before the District Court, Greenberg read what purported to be a full statement of the basis of his claim of privilege. It appears at pages 131-132 of the Record and reads as follows:

* * * the reason why I have refused to answer certain of the many questions put to me * * * before the Grand Jury is because my answers to these questions will incriminate me in a violation of federal criminal statutes, among which would be the violation of the Internal Revenue laws, and particularly 26 U.S.C.A., Section 145(a), (b) and (c), as well as 26 U.S.C.A., Section 1625(a) and 26 U.S. C.A., Section 1626(a), (b) and (c).

In my income tax returns for the year immediately preceding 1950 I have stated a certain local business in which I was engaged. In addition thereto, I have listed other income under the heading of "Miscellaneous". Were I to answer with respect to those years immediately preceding 1950, that I was engaged in another business, I would tend to incriminate myself with respect to the statutes and the section hereof that I have just mentioned. Were I to admit that I was in another business, lawful or unlawful, in these previous years, for which I have filed a return, I would be incriminating myself. Were I to admit that I was in another business that had a gross income from which there would have been deducted gross expenditures, including payment of employees, Your Honor, I would be incriminating myself. These incriminations would be with respect to these violations of the Federal Income Tax laws.

* * * with reference to the year of 1950, it is true that I have not yet filed my return for that year, and need not until March of

1951. But * * * if I were to answer those questions which I have refused to answer, I will tend to incriminate myself of violations of the Federal Income Tax laws of the sections hereinabove referred to * * *. [If] I admitted that I had a business other than the business that I have mentioned to the Grand Jury, if I admit that in that business I had employees, then I know that my answer will tend to incriminate me in the violation of Sections 1625(a), 1626(a), (b) and (c), as well as Sections 145(a), (b) and (c) above referred to. Were I to admit that I had no records and kept no account of my other business, lawful or unlawful, other than the business testified to, I would be incriminating myself in a violation of the Federal Income Tax laws. I know that if I admitted being in any other business, lawful or unlawful, and had employees in the operation of that business, and/or if I admitted that I did not withhold the tax due to the United States Government, I would be incriminating myself not only in violation of the income tax laws which I have enumerated above, but that I may tend to incriminate myself with regard to conspiracy charges in connection therewith. I also believe that answering the questions which I have refused to answer may tend to incriminate me in violation of the False Statements Statute * * *.

Thus Greenberg contends that disclosure that he is in business would (1) tend to show he has

employees and therefore tend to establish one component of the crime of failure to file withholding and social security tax returns;[1] (2) tend to prove that he was previously engaged in some business as to which, if the proceeds had not been reflected in his records or returns, he could not answer any question without incriminating him-

---

[1] Section 2707 of the Internal Revenue Code provides:

"(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who wilfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

"(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The duty to withhold and pay social security taxes is imposed by Sections 1400 and 1401(a) and the penal provisions made applicable by Section 1430.

The duty to withhold income taxes is imposed by Section 1622(a). Pertinent provision in the Regulations relating to Employment Taxes and to Withholding Taxes require return and payment quarterly. 26 C.F.R. 402.601, 405.601. They also require the employer to keep accurate records of all remuneration paid to his employees. 26 C.F.R. 402.609.

self under Sections 145(c) (now 3809(a)) of the Internal Revenue Code.[2]

It will be observed that neither of these objections has anything to do with the identification question. And, so far as we have been able to determine, no basis for claim of privilege with respect to that question was offered. For this reason, the issues posed by that question will be dealt with separately.

ARGUMENT

This Court remanded the case to the Court of Appeals in order that it might apply the principles enunciated in the *Hoffman* case to the facts here involved.

The *Hoffman* case emphasizes the importance of being alert to repress abuse of the investigatory power and, reasserts the doctrine that not only the disclosure of a complete crime, or an element thereof, but also the disclosure of a "link in the chain of evidence" is sufficient to sustain a claim of privilege against self-incrimination. (341 U.S. 486.) However, the Court also restated the limitation that the privilege should be available to a witness only when he has reasonable cause to apprehend danger and that his say-so is not of itself a sufficient basis for granting the privilege.

---

[2] Section 145(c) provides:

"Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony * * *."

The Court quoted with approval the language of Taft, J., in *Ex parte Irvine,* 74 Fed. 954, 960 (C.C. S.D. Ohio, 1896) stating that the trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

The question raised on this petition is whether or not the court below properly applied these principles to the facts in the case before it. In considering this aspect of the question, it is convenient to consider first the questions dealing with the nature of the witness's business and then the question relating to the identity of the numbers writers.

There is a superficial similarity between the questions dealing with the use of the petitioner's telephone and the business questions in the *Hoffman* case. In *Hoffman,* the question directly asked for the nature of the witness's business. In this case that particular question is not now in issue, but the questions with respect to the use of the telephone come out at about the same place. However, the similarity is only superficial since in this case not only are there no circumstances indicating a likelihood that the petitioner's business is illegal under federal law (a factor which was determinative in the *Hoffman* case), but the petitioner's entire explanation of his fear of answering indicates that he had no apprehension arising from the nature of his business as such. See pp. 4-5, *supra.* This approach is borne out by the petition

for certiorari, which attempts by the vigor of its language to span the gap between the information called for by the questions and the danger to the witness of being prosecuted for a federal offense by reason of his answer.

The witness asserts that he fears prosecution not because his business is illegal, but on the ground that his testimony could be used against him to prove that he had had employees, from whom he had not withheld income and social security taxes, and income, which he had not properly reported in his return. It is obvious that neither of these matters is directly connected with the nature of the witness's business. The only connection asserted by the petitioner is that it is established that some numbers operators employ help and that there is, therefore, a possibility that petitioner was such an operator and might have employed runners or record keepers. But this possibility does not justify the claim of privilege. Its usefulness to show guilt depends upon so many speculative suppositions that the danger to petitioner is negligible. To show guilt it must be assumed that the description of the numbers business is complete; that petitioner is in the numbers business; that he is a banker rather than a writer or a pickup man; that he is a banker with "employees"; that any "employees" he may have fall within the definition of employees embodied in the statutes involved, although it is common knowledge that the

relationships between persons in illegal business frequently are studiously distant and independent. Actually the petitioner appears not to have been so much afraid of the answers to the particular questions as to whether he was in the numbers business, as he was to the questions which he anticipated would follow with respect to whether or not he did have employees and whether or not he did have income. This fear cannot justify his refusal to answer the questions actually asked. The court below properly reached the conclusion that the danger from the answers to the particular questions asked was not sufficiently real to justify upholding the claim of privilege.

Turning to the question with respect to the identity of the numbers writers with whom the witness was acquainted, the similarity to the facts of the *Hoffman* case is even more remote. In the *Hoffman* case the witness freely admitted his long-standing acquaintance with William Weisberg and the question of privilege arose with respect to an attempt to locate Weisberg in connection with an outstanding subpoena. No such question is involved in the present case.

The petitioner attempts to rely on a decision of this Court in which a witness was asked as to the identity of certain officials of the local Communist organization. '*Patricia Blau* v. *United States,* 340 U.S. 159. The similarity of that case to the present one disappears when it is realized that the answer

was there held to be privileged by reason of the fact that it would disclose knowledge of the internal affairs of the Communist Party which, it was held, would serve as a link for prosecution for violation of the Smith Act. Obviously no comparable circumstances exist with reference to the disclosure of the names of numbers writers whom the witness has already admitted knowing.

Moreover, petitioner's apparently full statement of his reasons for refusing to answer the identification question indicates no reason why the disclosure of the names of the numbers writers would endanger him. The reasons stated are all related to the telephone questions. This fact alone would be enough to deny the privilege with respect to this question.

It is submitted that all that is involved in this case is the application of principles which have recently been reasserted by this Court in the *Hoffman* case to the particular facts in the case before the court. The court purported to apply these principles, and analysis of the facts indicates no error of judgment in this regard.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

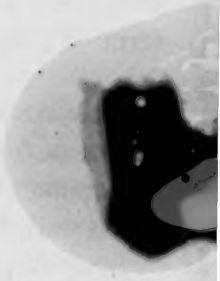
PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

JANUARY, 1952.



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THE UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S SUPPLEMENTAL MEMORANDUM.

This Memorandum is impelled by two material misstatements of fact in the Government's Brief in Opposition.

I. A. The Solicitor General says (Br. Op. 7),

> • • • so far as we have been able to determine, no [illegible] for claim of privilege with respect to that question [the identification question, "Who?"] was of-

[illegible]

. The record shows precisely the opposite.

(1) Petitioner gave a full statement of his reasons for refusing to answer all of the questions which remained unanswered, and that statement was, with the consent of the prosecutor, incorporated into the Grand Jury presentment.

See R. 178a, which refers to Question 8, the "Who?" question (R. 5a-6a).

(2) The full statement of petitioner's reasons for standing on his claim of privilege appears at R. 131a-132a and again at R. 174a-176a. A portion—but only a portion—of that statement is reproduced at Br. Op. 4-5. Here is the last paragraph of petitioner's statement, which, as just noted, was applied to the "Who?" question, but which the Solicitor General failed to include in his brief (R. 132a, 176a):

> My fear and apprehension that I would tend to incriminate myself is based upon not only that which I have read in the newspapers[1] but also upon the fact that Morton Witkin, Esq., of my counsel in whom I have great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself. I believe that his advice is sound and I choose to rely upon it. May I say in conclusion that these two reasons are in addition to and not exclusive of my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be.

(3) Petitioner's comprehensive offer of proof at the trial (R. 48a-53a), which applied to all of the unanswered questions, disclosed additional reasons for his failure to answer.

---

[1] The newspaper accounts (R. 196a-197a), which were received in evidence at the trial (R. 56a), included the following:

> Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws, he [Goldschein] said.
>
> • • • •
>
> Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes.

(4) After petitioner had been found guilty, and before sentence, his counsel said, *inter alia* (R. 66a):

> • • • in one of the three questions that we failed to answer, the question "Who", my argument *was* he would be giving the names of witnesses against himself • • •

We have italicized the past tense to show that the argument had been made earlier; it is not in record because the full transcript was not printed.

II. A. The Government's Brief in Opposition continues (Br. Op. 11):

> Moreover, petitioner's apparently full statement of his reasons for refusing to answer the identification question indicates no reason why the disclosure of the names of the numbers writers would endanger him. The reasons stated are all related to the telephone questions. This fact alone would be enough to deny the privilege with respect to this question.

B. The same inaccuracies and omissions already noted under item I permeate this excerpt also: Petitioner's reasons for refusing to answer included an apprehension of self-incrimination based upon the newspaper reports of the prosecutor's plan of reaching numbers operators through the federal tax laws; they included the advice of petitioner's counsel; and they included the fear that if he answered the question "Who?" he would be supplying the prosecutor with the names of witnesses against himself.

Respectfully submitted.

Frederick Bernays Wiener,
1009-1015 Tower Building,
Washington 5, D. C.,

Jacob Kossman,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

January 1952.

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the Court of Appeals (R. 234-241) is reported at 187 F. 2d 35. The orders of this Court granting petitioner's previous petition for a writ of certiorari, vacating the judgment of the Court of Appeals, and remanding the case to that court for reconsideration (R. 242-244) are reported at 341 U. S. 944. The opinion of the Court of Appeals on remand (R. 245-247) is reported at 192 F. 2d 201.

JURISDICTION

The judgment of the Court of Appeals (R. 248) was entered on November 15, 1951. The petition for a writ of certiorari was filed December 4, 1951, and was granted January 28, 1952 (R. 249). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, a witness before a grand jury investigating violations of federal statutes, could lawfully refuse, on the asserted ground that his answers would tend to incriminate him under the federal social security and withholding tax laws, to answer questions disclosing his business and the names of number writers whom he admitted he knew.

2. Whether the formal judment adjudging petitioner guilty of contempt varied from the earlier oral finding of the court, and, if so, whether the formal judgment is controlling as to the basis of the finding of contempt.

3. Whether there was an order by the District Court that petitioner answer the questions he had refused to answer before the grand jury, and whether there was proof of his disobedience of such an order.

4. Whether the District Court erred in refusing petitioner access to the grand jury minutes and government files.

CONSTITUTIONAL PROVISION AND STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Constitution, statutes, and regulations are set out in the Appendix, *infra*, pp. 83-88.

STATEMENT

On September 14, 1950, a grand jury for the Eastern District of Pennsylvania began "an inquiry concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses" (R. 2).[1] Petitioner was subpoenaed to appear as a witness before the grand jury on October 2, 1950, at which time he refused to answer certain questions, claiming that his answers might tend to incriminate him (R. 2). The refusal to answer three of these questions, which are italicized in the quotation below, forms the basis of this case. The first question, which we shall refer to as the identification question, and which can be understood only in context of an immediately preceding question, was as follows (see R. 5-6):

---

[1] Pages 1-201 of the Record are numbered therein as 1*a*-201*a*. References in this brief to such pages will not include the "*a*".

Q. Do you know any numbers writers around there (1133 West Diamond Street) men who are in the numbers business?

A. Yes.

1. Q. *Who?*

A. (After consultation with counsel) I refuse to answer this question because it will incriminate me * * *.

The second and third, which we shall refer to as the telephone questions, in necessary context, were as follows:

Q. Do you make regular calls from that telephone (at 1133 West Diamond Street), since 1950?

A. Yes.

Q. Do you use that phone in connection with your business?

* * * * * * * *

A. Not for my lawful business.

2. Q. *Do you use it for any other business?*

A. Well, I refuse to answer the question because it will incriminate me and I stand on my Constitutional rights * * *.

* * * * * * * *

Q. Is it your real estate business you use it for?

A. No.

3. Q. *What business do you use it for?*

A. I refuse to answer the question because my answer will incriminate me. I stand on my Constitutional rights.

On October 9, the Government requested the District Court to instruct petitioner to answer the questions (R. 2, 203, 204.) On that date a hearing, at which petitioner was present with counsel (R. 2, 203-204), was held upon his claim of privilege (R. 2, 71-99, 198, 203-205). And on October 16, the court, after hearing further argument of counsel, found that there was no real and substantial danger that the answers to the questions would incriminate petitioner of a federal crime, and ordered him to return before the grand jury and answer them (R. 2, 198). On October 17, petitioner was recalled as a witness before the grand jury and again refused to answer the questions italicized above (R. 3, 198-199). Extensive hearings before the court on petitioner's claim of privilege, consisting primarily of argument by counsel, followed on October 17-20, 23, 30 and 31,[3] at which he was again represented by the same counsel.

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[3] The complete transcript of these hearings is not included in the printed record. The parts included are at the following pages: October 9: R. 203-205; 71-95; 215-216; 95-99. October 17: R. 99-102. October 18: R. 102-109. October 19: R. 109-112. October 20: R. 112-115; 205-207, 115-117; 216-220; 117-118; 220-222; 207-209, 222-223, 118-119; 223, 119-120, 209, 223-230; 120-121. October 23: R. 121-143; 209 (last line)-212; 143-145. October 30: R. 230-233; 145-148. October 31: R. 149-157.

At one of these hearings, on October 23, petitioner testified in substance that he refused to answer the questions because the answers would incriminate him under the internal revenue laws; that he stated in his 1949 income tax return that he was engaged in a certain local business [*i. e.*, real estate] and listed other income under "Miscellaneous"; and that his apprehension that his answers to the questions would tend to incriminate him was based on what he had read in the newspapers, his counsel's advice, and his own knowledge of what his answers would be (R. 130-132).[3]

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[3] The full statement made by petitioner (R. 131-132) was as follows:

> If Your Honor pleases, the reason why I have refused to answer certain of the many questions put to me by Mr. Goldschein before the Grand Jury is because my answers to these questions will incriminate me in a violation of federal criminal statutes, among which would be the violation of the Internal Revenue laws, and particularly 26 U. S. C. A., Section 145(a), (b) and (c), as well as 26 U. S. C. A., Section 1625(a) and 26 U. S. C. A., Section 1626(a), (b) and (c).
>
> In my income tax returns for the year immediately preceding 1950 I have stated a certain local business in which I was engaged. In addition thereto, I have listed other income under the heading of "Miscellaneous." Were I to answer with respect to those years immediately preceding 1950, that I was engaged in another business, I would tend to incriminate myself with respect to the statutes and the sections hereof that I have just mentioned. Were I to admit that I was in another business, lawful or unlawful, in these previous years, for which I have filed a return, I would be incriminating myself. Were I to admit that I was in another business that had

Petitioner's counsel also stated that, based upon information given him by petitioner and his own knowledge of the law, it was his opinion that the answers would incriminate petitioner (R. 143).

On October 30, petitioner again appeared with counsel before the court, which "again found that there was no real and substantial danger of in-

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a gross income from which there would have been deducted gross expenditures, including payment of employees, Your Honor, I would be incriminating myself. These incriminations would be with respect to these violations of the Federal Income Tax laws.

Now, may it please Your Honor, with reference to the year of 1950, it is true that I have not yet filed my return for that year, and need not until March of 1951. But, may it please Your Honor, if I were to answer those questions which I have refused to answer, I will tend to incriminate myself of violations of the Federal Income Tax laws of the sections hereinabove referred to, and argued at length by my attorney on Friday last. May it please Your Honor, if I admitted that I had a business other than the business that I have mentioned to the Grand Jury, if I admit that in that business I had employees, then I know that my answer will tend to incriminate me in the violation of Sections 1625(a), 1626(a), (b) and (c), as well as Sections 145(a), (b) and (c) above referred to. Were I to admit that I had no records and kept no account of my other business, lawful or unlawful, other than the business testified to, I would be incriminating myself in a violation of the Federal Income Tax laws. I know that if I admitted being in any other business lawful or unlawful, and had employees in the operation of that business, and/or if I admitted that I did not withhold the tax due to the United States Government, I would be incriminating myself not only in violation of the income tax laws which I have enumerated above, but that I may tend to incriminate myself with regard to

crimination for the violation of a Federal statute * * * and ordered him to return before the Grand Jury and answer" the questions which he had refused to answer (R. 199; see also R. 4, 146, 231-232). Later that day petitioner was recalled before the grand jury, where he again refused to answer the questions (R. 6-8, 10-14, 199-201).

On November 1, the grand jury filed a presentment with the court (R. 2-9) which, as later

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conspiracy charges in connection therewith. I also believe that answering the questions which I have refused to answer may tend to incriminate me in violation of the False Statements Statute of the Federal Criminal Code.

My fear and apprehension that I would tend to incriminate myself is based upon not only that which I have read in the newspapers but also upon the fact that Morton Witkin, Esq., of my counsel in whom I have real great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself. I believe that his advice is sound and I choose to rely upon it. May I say in conclusion that these two reasons are in addition to and not exclusive of my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be.

The newspaper accounts referred to by petitioner (R. 196-197, and see R. 56) stated that the Department of Justice was opening a "racket probe" in Philadelphia; that all forms of crime were to be investigated by a federal grand jury; and that the investigation conducted by the special agents working under Mr. Goldschein would, he indicated, "extend to rackets in all their ramifications". He was further reported as having said that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws."

amended (R. 170-180), charged, *inter alia,* that petitioner had been ordered by the court on October 30 to answer before the grand jury, and later that day had refused to answer, the questions italicized in the quotation on pp. 4-5, *supra.* The presentment further charged that petitioner, by refusing to answer the questions, had (1) "willfully, deliberately and contumaciously shut off and blocked the search for truth, thwarted the investigation of this Grand Jury in the matter hereinbefore set out, and obstructed the administration of justice," and (2) had "willfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court by willfully and deliberately refusing to obey the Order of this Court to answer before the Grand Jury the aforesaid questions" (R. 8, 199-201).

At petitioner's trial for contempt on November 3, petitioner introduced as evidence certain pages of the transcript of the earlier hearings (R. 14-15, 71-195). A certified public accountant who was a tax expert testified that if petitioner during 1950 was engaged in an unlawful business or in the numbers business and had employees in such business who were not exempt, he would have been obligated under the internal revenue laws and the Federal Insurance Contributions Act to have made withholding deductions from the employees' wages and to have made quarterly returns of such deductions to the Collector of Internal Revenue

(R. 18-30). Petitioner testified that he had not filed any withholding tax returns during 1950 (R. 37), and he introduced a statement he had made before the grand jury that "in the number business there are bankers" and "people who work for the bankers; who, among other duties, compute the records as turned in by the pickup men and the number writers" (R. 25-26).[4]

Petitioner also moved for a ruling on a subpoena *duces tecum* which he had on October 17 served on the government attorney in charge of the grand jury investigation, Mr. Goldschein, to produce all government records and grand jury minutes concerning the investigation of, and containing information about, petitioner. The Government had resisted the demand (R. 100) and filed a motion to quash the subpoena. The district court at various times (October 19: R. 111; October 31: R. 150-151; November 1: R. 190) prior to the contempt trial had ruled that it would not permit the disclosure sought unless petitioner made some initial showing that the questions might be dangerous to him. The petitioner's renewed request at the trial was again rejected on the same ground (R. 53).

Petitioner also called Mr. Goldschein as a witness and offered to prove that petitioner answered almost all of hundreds of questions asked him before the grand jury; that petitioner was being

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[4] Petitioner was not cross-examined on his testimony (R. 37-45).

investigated by the Government and before the grand jury; that other witnesses before the grand jury had been asked questions concerning petitioner; that the answers to these questions which he refused to answer were known by the Government; that the Government already had information "which would definitely establish the unlawful business" of petitioner; that Mr. Goldschein had made statements to the press as reported in newspaper articles which showed that there was a definite plan on the part of the Government to prosecute petitioner for violation of the federal income tax laws (R. 48-53). The Government's objection to this offer of proof was sustained, as follows (R. 52-53):

> Mr. O'Keefe [Government counsel]. If the Court please I think we can boil these points that he has down to about three. First, he wants Mr. Goldschein to reveal to him and in open court the transactions of the Grand Jury, which is not permissible, as Your Honor knows. He wants to show by his second point that the motion that Your Honor has under consideration now, namely that he produce his records, he wants to show by that whether or not he has a case or can present a case before the Grand Jury for violation of a Federal statute, what the evidence is that he has, and thirdly on that point he is making or will attempt to make Mr. Goldschein show all the

> evidence that the Government has, if they do have any, and we certainly don't admit one way or the other that they have sufficient evidence to put before the Grand Jury to make a case on this man.
>
> * * * * * * * *
>
> The Court. All right, the objection is sustained. The Court so holds as to each and every one of the offers seriatim. The motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made.

Several days later, November 8, petitioner was called to the bar of the court and it "adjudge[d]" him "in contempt of court," but informed him that the court was "now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer," to which petitioner's counsel replied, "We take the same position we have taken before" (R. 65). After a plea by petitioner's counsel for leniency, the court sentenced petitioner to five months' imprisonment and admitted him to bail pending appeal (R. 71). A notice of appeal was filed the same day (R. 1). On November 10, the court entered its formal judgment (R. 198-201) adjudging petitioner "guilty of a contempt of this Court by a forcible resistance to a lawful Order thereof," i.e., in refusing to answer the questions, "Who,"

"Do you use it for any other business," and "What business do you use it for," quoted above.

The Court of Appeals affirmed the conviction (R. 234-241), holding *inter alia,* that "the district court based the finding of contempt solely upon the appellant's refusal to answer" the three questions mentioned in the formal judgment (R. 236).[5] Petitioner thereupon filed a petition for certiorari in this Court. On June 4, 1951, this Court granted the petition, and vacated the judgment of the Court of Appeals and remanded the case to that court for reconsideration in light of *Hoffman* v. *United States,* decided May 28, 1951 (R. 243-244). After reargument and reconsideration, the Court of Appeals found no reason to change its earlier views (R. 245-248) and again affirmed the judgment of the District Court (R. 248). A second petition for certiorari, filed December 4, 1951, was granted January 28, 1952 (R. 249).

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[5] The Court of Appeals noted in its first opinion that the district court did not rule on the question "Are you in the numbers business now?" and therefore concluded that the problem of the incriminatory character of the question was not before it on appeal (R. 236). Petitioner suggests (Pet. 18-19) that the Court of Appeals considered this question on remand and held it nonincriminatory. He urges that if the question was not before the court on the first appeal, there was no way that it could have come before it on the remand from this Court. However, we can find nothing in the Court of Appeals' second opinion which suggests that it did in fact pass upon the incriminatory character of this question (R. 245-248), and the Government does not rely upon petitioner's refusal to answer it as a basis for supporting the judgment below.

SUMMARY OF ARGUMENT

I

A. The controlling principles with respect to the privilege against self-incrimination were recently stated by this Court in *Hoffman* v. *United States,* 341 U.S. 479. That case reasserts the doctrine that not only the disclosure of a complete crime, or an element thereof, but also the disclosure of a "link in the chain of evidence needed to prosecute the claimant for a federal crime" is sufficient to sustain a claim of privilege against self-incrimination (341 U.S. 486). However, the Court also restated the limitation that the privilege should be available to a witness only when he has reasonable cause to apprehend danger and that his say-so is not of itself a sufficient basis for granting the privilege.

The *Hoffman* case leaves open the questions: how strong a link must the answer be; whether the answer must be a link in the evidence admissible at trial, or whether it is barred if the answer would be merely a clue that might possibly lead to evidence that could be used at a trial.

1. The mere fact that evidence may be admissible at the trial does not suffice to justify a refusal to make disclosure. Rather, the answer must be evidence of substantial probative value. *Mason* v. *United States,* 244 U.S. 362; *United States* v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,692e, p. 38 (C.C. D.Va.). The recent decisions in *Hoffman* v.

United States, supra, and *Blau* v. *United States,* 340 U.S. 159, have not altered this rule.

2. The cases also indicate that this Court has never held that it was a sufficient ground to refuse to answer a question that the answer may disclose clues which might lead to the discovery of evidence which would sustain a prosecution. *Counselman* v. *Hitchcock,* 142 U.S. 547, 564, held only that a statute providing that evidence obtained from a party could not "be given in evidence, or in any manner used against him" in a criminal or forfeiture proceeding was unconstitutional. Because the Court thought that the evidence given might be used to search out other evidence whose introduction was not proscribed, the immunity was not a complete substitute for the constitutional privilege, and therefore did not suffice. But the evidence in the case was in fact directly incriminating. Hence that case is not a holding that the privilege covered all evidence which might be useful to provide clues. And see *Brown* v. *Walker,* 161 U.S. 591, 600; *Mason* v. *United States, supra;* and compare *Hoffman* v. *United States, supra,* and *Blau* v. *United States.*

Even if the constitutional privilege has application to protect witnesses from having to disclose "clues," however, there still must be real danger of crimination. A series of cases in the Second Circuit, which has taken a broad approach to the privilege, indicate the great degree of danger re-

quired. *United States* v. *Cusson*, 132 F. 2d 413; *United States* v. *Weisman*, 111 F. 2d 260; *United States* v. *Flegenheimer*, 82 F. 2d 751; *O'Connell* v. *United States*, 40 F. 2d 201.

B. This Court has also indicated on numerous occasions that the judgment of the District Court in evaluating the danger of a claim in light of all the relevant circumstances is entitled to great weight. See *Mason* v. *United States*, *supra*, at 366; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113; cf. *Ex parte Irvine*, 74 Fed. 954, 960 (S.D. Ohio). While it is true that the *Hoffman* case, *supra*, did overrule the determination of the District Court in that case, it did not suggest any modification of the rule of great deference to the trial judge's decision.

C. Application of the above principles of law to this case shows that there is no real danger here. The admission by petitioner that he is in the numbers business has no significant tendency to show that he is an employer in that business. He might be and he might not be. The court should consider the fact that even if people work for petitioner in the numbers business they might not be "employees." Cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111. The danger feared by petitioner is not from the disclosure that he is in the numbers business, but from prospective, as yet unasked, questions he fears will

follow. Such contingent fears cannot justify invocation of the privilege.

There can be no income tax liability arising from answers to the telephone questions (1) because it is not shown to be a willful misstatement of a material fact to classify income as "miscellaneous," and (2) so far as petitioner is disturbed about a disclosure of additional income, the objection relates to questions not yet asked.

D. Petitioner does not contend that a disclosure of names of numbers writers known to him around 1133 West Diamond Street could amount to a direct admission of crime. He argues instead that the answer to the question would amount to a "link in the chain of evidence" against him. But it is evident that the admission itself that he knew numbers writers would be too neutral to be dangerous. See *United States* v. *Flegenheimer, supra; O'Connell* v. *United States, supra.* There are here none of the special circumstances that might have made knowledge dangerous as in *Blau* v. *United States, supra,* where the matter concerned a clandestine, conspiratorial association. Cf. *United States* v. *Weisman,* 111 F. 2d 260 (C.A. 2).

Although petitioner disclaims the necessity of relying on the incriminatory possibilities of the identity question as a clue to evidence, rather than as evidence itself, it seems to us a more plausible position, if there is any such basis for the privilege.

However, we note that the petitioner never made claim, under oath, that this was the basis for his fear and, we therefore see no reason for recognizing it.

The claim is insufficient in any event because the danger, in light of the cases on the necessity for real danger, is insufficient. Petitioner flatly refused to disclose the names of any number writers around 1133 West Diamond Street, although, on the record, it is perfectly obvious that not all of them would be his employees. Consequently, petitioner's position must be read to claim the right to refuse to disclose the names of those whose knowledge of facts which may criminate him is wholly fortuitous. The gap between the admission and crime is too great.

E. Finally, it should be noted that the judgment should be affirmed if any one of the questions should have been answered, as the sentence of contempt was a general sentence.

II

Petitioner contends that, because the formal judgment omitted any reference to the charge in the presentment that he refused to answer the question, "Are you in the numbers business now?," and because it failed to find him guilty of obstruction of justice, it varied from the District Court's oral pronouncement of judgment and was therefore void. *Prima facie,* the formal judgment is

controlling. *United States* v. *Hark*, 320 U.S. 531, 534-535. Whatever ambiguity there may have been in the oral judgment was resolved by the formal judgment. Moreover, the formal judgment was, if at variance, at least more favorable to petitioner.

No importance can be attached to the failure to deal with one of the questions asked because the issues with respect to that question were embraced by the rulings on other questions.

III

Petitioner further contends that there was no proof of any disobedience of any order of court. Reference to the record will show that, on at least two occasions (R. 231, 146), the court ruled that petitioner would have to answer the questions now in issue. Further, petitioner admitted at the trial that he had refused to answer before the grand jury the questions set forth in the presentment (R. 10-14). When the court offered him an opportunity to purge himself by answering the questions, his counsel stated, "We take the same position we have taken before" (R. 65).

IV

Petitioner also contends that the judgment below should be reversed because he was denied access to grand jury minutes and government files containing matters relating to himself. He relies on

Second Circuit cases which suggest that a prosecution cannot be sustained if the defendant is denied the means for his defense. See, in particular, *United States* v. *Zwillman*, 108 F. 2d 802.

Petitioner's position was properly overruled. He made no such showing of danger as would permit examination of the minutes. (Rule 6(c) of the Federal Rules of Criminal Procedure makes the matter discretionary with the trial judge.) The inference is strong that petitioner wanted simply to embark on a "fishing expedition." Petitioner's position with respect to the Government's records stands essentially on the same footing.

The Second Circuit cases on which petitioner relies to support the proposition that the Government cannot prosecute while it denies the defendant an opportunity to defend do not justify an indiscriminate search of government files. They all relate to specific demands. See, e.g., *United States* v. *Andolschek*, 142 F. 2d 503.

More basic, however, is the fact that in evaluating the claim of privilege, the District Court takes into account the factors indicative of danger. Their actual presence or absence in the grand jury minutes is not then of much importance.

ARGUMENT

I

There Was No Real Danger That the Questions Which Petitioner Refused to Answer Would Have Incriminated Him

A. The Decisions of This Court Establish That There Must be a Real, Substantial Danger of Incrimination to Justify the Claim of Privilege.

The controlling principles with respect to the privilege against self-incrimination were stated by this Court in its recent decision in *Hoffman* v. *United States,* 341 U.S. 479, 486, as follows:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (*Patricia*) *Blau* v. *United States,* 340 U.S. 159 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 244 U.S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States,* 340 U.S. 367 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple* v. *Commonwealth,* 75 Va. 892, 899 (1881). * * *

One test to be used in deciding issues of privilege is thus made clear: Where there is any reasonable likelihood that an answer to a question would itself be a direct admission of crime or any element thereof, the claim of privilege must be sustained.

It is in respect to the answer which would "furnish a link in the chain of evidence needed to prosecute a claimant for a federal crime" that the *Hoffman* decision leaves open a number of questions which it was unnecessary in that case to reach. How strong, and how direct a link must the answer be? Must it be a link in the evidence admissible at the trial, or is the privilege applicable if the answer would be merely a clue that might lead possibly to evidence that could be used at a trial? Is any general rule applicable or must each case turn on its special facts? It is on the solution of these problems that the disposition of this case depends. Hence, before discussing the issues posed by the specific questions put to petitioner, we examine the standards which the prior decisions of this and other courts have laid down as guide-posts.

1. *The mere fact that an answer to a question may be admissible in evidence at a trial does not render it subject to the privilege.*—The decisions of this Court make it clear that the mere fact that the information obtained in answer to a question may be admissible evidence at a trial does not justify the claim of privilege. The danger from the answer must be real and substantial in a probative sense.

This Court, in the *Hoffman* decision, cited with approval *Mason* v. *United States,* 244 U.S. 362. There it was held, by a unanimous Court, that a witness would not expose himself to danger by admitting that an illegal game of cards was being played at a table where he was sitting. Manifestly, the fact that the witness was at the gaming table was a fact which would be admissible in evidence against him. The Court nevertheless found that the protection was "confined to real danger and does not extend to remote possibilities out of the ordinary course of law," citing *Heike* v. *United States,* 227 U.S. 131, 144,[6] and *Brown* v. *Walker,* 161 U.S. 591, 599, 600.[7] Otherwise stated, the Court found that the possible inference from petitioner's

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[6] In this case the Court held that the witness was not immunized from prosecution because of certain grand jury testimony, for the reason that the testimony, not being within the scope of the privilege, could not be the basis of later immunity. In the earlier investigation the witness had presented certain tables showing the total amounts of sugar melted by his company. The substance of the subsequent criminal charge against the witness was that he had committed a fraud on the revenue by making entries of some of this sugar at less than its true weight. The Court, by Holmes, J., pointed out that the "mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds." 227 U. S. at 143.

[7] In *Brown* v. *Walker,* although the point was not dwelt upon, the majority of the Court seems to have indicated that there could be no danger to an auditor in answering whether the company for which he worked had given improper rebates, where the statute imposed no personal liability on the auditor.

presence at the gaming table that he was actually engaged in gaming did not have sufficient evidential value to justify the claim of privilege.

In the *Mason* case, the Court cited *United States* v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,692e, p. 38 (C.C. D.Va.), the first important American decision to deal with this problem. The case concerned a claim by Willie, who had been secretary to Aaron Burr, that he should not be required to answer whether he presently understood the code in which was written a letter dealing with Burr's allegedly treasonous activity, it being pointed out that if he knew of the treason and failed to disclose it, he was guilty of crime. Chief Justice Marshall defined the general rule of the "link in the chain of evidence" test, in words that have frequently been echoed in subsequent opinions, as follows, pp. 39-41:

> * * * Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction.

> That fact of itself might be unavailing, but all other facts without it would be insufficient. While that fact remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

In applying this test to the particular facts of that case, the court said:

> * * * But, on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher, it appears to the court that the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of providing that fact.

Obviously the fact of the witness's present knowledge of the cipher would have been a fact admissible at the trial. Yet that plainly was not the test which the Court applied; the test was the real probative value of such admissible evidence. One may disagree with the conclusion without rejecting the test.

The nature of the test is made clearer when considered in relation to the cases in which the privilege has been sustained.

Thus in the *Hoffman* case, the relationship between the answers which it was supposed that Hoffman would have to make to the so-called Weisberg questions, and the crimes for which he feared prosecution, was very close. Once it was assumed that Hoffman might have to disclose contacts between himself and Weisberg at a time when Weisberg was eluding a subpoena, and particularly, that he might have to disclose that Weisberg was hiding out at his premises or with his assistance, the relevance of such answers to proof of the crimes of obstruction or conspiracy was clear and direct, and not conjectural. It is true that there might be innocent explanations of such conduct. But on such answers alone, a jury would have been justified in making a finding against Hoffman. At the very least, the evidential value of the admissions would certainly be strong. Thus, in *Hoffman* the Court found a real, substantial danger of incrimination, not so much because the answers would have been admissible in evidence against him but because the *probative value* of such evidence was real and substantial.

Similarly this Court was dealing with evidence of real probative value when it held in *Blau* v. *United States,* 340 U.S. 159, that questions which called for answers admitting knowledge of the

organization, or whereabouts of the books, or employment by the Communist Party, might expose the petitioner to prosecution under the Smith Act. If Mrs. Blau possessed the kind of information about a clandestine and revolutionary organization which the questions asked her suggested, the likelihood that she was directly involved in activities illegal under the Smith Act was very strong. Her answers would not only have been admissible, they would have had real, and not merely remote or conjectural, probative value.[8]

2. *If evidence which is not sufficiently direct to be admissible at a trial is ever grounds for assertion of the privilege on the theory that it may furnish a clue leading to relevant evidence, the relationship between the clue and the apprehended danger must be very close.*

Petitioner suggests (Pet. 16) that the claim of privilege must be sustained if his answers "might lead to the discovery of evidence linking him with a violation of federal law or with a federal conspiracy, even though the answer to the particular

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[8] While the language of some of the cases is broader than it needs to be, most of the cases dealing with the danger of incrimination under the Smith Act are consistent with this rationale. *Wertheimer* v. *United States*, 179 F. 2d 559 (C.A. 10); *Alexander* v. *United States*, 181 F. 2d 480 (C.A. 9); *Doran* v. *United States*, 181 F. 2d 489 (C.A. 9); *Kasinowitz* v. *United States*, 181 F. 2d 632 (C.A. 9); *Estes* v. *Potter*, 183 F. 2d 865 (C.A. 5), certiorari denied, 340 U.S. 920; *Healey* v. *United States*, 186 F. 2d 164 (C.A. 9).

question might not by itself incriminate him federally." In other words, it is claimed that, although the answer to a particular question may not even be sufficiently direct to be admissible at a trial, the privilege applies if the answer, although not a link in the "chain of evidence," is a link in a chain which may lead to evidence.

The source of this broad theory of the privilege is a dictum in *Counselman* v. *Hitchcock,* 142 U.S. 547, 564, in which this Court decided that an immunity statute, providing that evidence obtained from a party could not "be given in evidence, or in any manner used against him" in a criminal or forfeiture proceeding, did not confer an immunity as broad as the privilege, because the immunity statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property." The Court said, at p. 585:

> * * * It is a reasonable construction * * * of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him."

This dictum was in substance repeated with respect to the same type of immunity statute in *Arndstein* v. *McCarthy*, 254 U.S. 71, 73. See also *Ballmann* v. *Fagin*, 200 U.S. 186, 195.

However, in the *Counselman* case, the questions, if answered, involved a direct admission of criminality since the witness was asked if a company of which he was an officer had received illegal rebates, and officers of such companies were subject to prosecution. In the *Arndstein* case the admissions sought would have shown that the witness had made false statements under oath in a bankruptcy schedule. Consequently, the questions asked would have come within the claim of privilege under the principles discussed in point A1 above. If, without reference to an immunity statute, the witness' claim of privilege were sustained, his answers would not be available to the prosecution, either as testimony, or as clues to other testimony. To compel the witness to answer, and then merely to exclude the answer at the trial, would not have restored the witness to the same position as he would have been in had he claimed the privilege prior to the immunity statute, since the statute left the prosecution free to use the answer to ferret out other evidence. The statute was thus, as the Court held, not as broad as a privilege.

A holding that an answer, clearly incriminating, cannot be used for any purpose, not even to ferret out information, is far different from a holding

that an answer, which in and of itself is not incriminating, becomes subject to the privilege because it may *possibly* be used to ferret out information.[9] That the Court in the *Counselman* case was making the former and not the latter holding, as petitioner argues, is we think, made clear by the citation with apparent approval of *United States* v. *Burr* (*In re Willie*) discussed *supra*. It quoted therefrom as follows (142 U.S. at 566):

> It would seem, then, that the court ought never to compel a witness to give an answer

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[9] *Smith* v. *United States*, 337 U.S. 137, which has some language that seems to adopt a broad scale clue test, does not in fact do so. It was held there that a witness who had appeared in an OPA investigation pursuant to subpoena and disclosed data relating to the sale in the open market of goods obtained under a government priority could claim immunity from prosecution for intentional misuse of priority ratings and unlawful use of textiles obtained by such priorities. It is true that the Court at one point (p. 153) said: "Certainly many of these disclosures furnished leads that could have uncovered evidence of the unlawful conspiracy charged in the indictment." However, it is clear that the testimony included disclosures of specific and persuasive evidentiary value against the witness; and the Court had indeed earlier said (p. 148-149): "Some, at least, of the disclosures, such as the use of blanket priorities of Metals Disintegrating to procure textiles and the method of fixing prices on surplus sales, bore directly on the subsequent charges of misuse of priorities and the goods obtained thereby as well as the charge of conspiracy to violate the Price Control Act. The facts brought out • • • are not facts disassociated from his prosecution as in *Heike* v. *United States*, 227 U.S. 131, but in the language of the Compulsory Testimony Act are pertinent to the prosecution and 'concerning which' petitioner testified. The facts were links in the chain of evidence."

> *which discloses a fact that would form a necessary and essential part of a crime* which is punishable by the laws. [Emphasis supplied.]

The later decision in the *Mason* case further supports the view that *Counselman* was not intended to have the broad construction which has been assigned to it. It is impossible to reconcile the *Mason* case with the theory that a non-incriminatory answer is subject to the privilege merely because it may furnish a clue to other evidence. Certainly, the admission that one was sitting at a gambling table would be sufficient to furnish a clue to witnesses who might testify to the fact that the witness gambled.

Consequently, the apparent explanation for the holding is that the Court did not regard the *Counselman* decision as having the sweeping effect which is assigned to it.

While neither the *Hoffman* nor *Blau* decisions directly involved the point, it is significant that they speak in terms of link in the "chain of evidence," and not of links in a chain of clues to evidence.[10] We believe, therefore, that there is no

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[10] See also *Brown* v. *Walker*, 161 U.S. 591, 600, where, in sustaining an immunity statute passed to answer the *Counselman* objection, this Court said:

> The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some

authority to support petitioner's argument that even though the answer to a question is not in itself incriminating, it can still be the basis of a claim of privilege.

Even assuming, however, that it should be held that the privilege may be claimed on the ground that the answer, although not in itself incriminating, will furnish a clue to relevant evidence, it is clear that the relationship between the answer and the apprehended danger must be very real and very close. As was pointed out in point A1, *supra*, this Court has held that even evidence sufficiently relevant to be admissible at a trial is not subject to a claim of privilege unless the answer has real probative value. Manifestly, at least as rigid a standard must be applied where the answer is not directly relevant but at most can furnish a clue to evidence.

We cannot look to the decisions of this Court for illustrations of this principle for, as discussed above, this Court has never applied the theory that a mere clue is sufficient basis for invoking the privilege. The Court of Appeals for the Second Circuit, however, has adopted a test of the privilege which is akin to and embraces the posi-

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third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

tion that answers which lead to evidence may be within the privilege. Without regard to whether the answer would or would not be admissible at a trial, that court has said "the question is always whether the danger to be apprehended from an answer is near enough to be real, or whether it is too remote to be substantial," *United States* v. *Cusson,* 132 F. 2d 413, 414, and "in the end we should say no more than that the chase must not get too hot, or the scent too fresh," *United States* v. *Weisman,* 111 F. 2d 260, 263. This concept of the privilege obviously includes non-incriminatory answers which lead to evidence, and at the same time suggests the standard by which such answers must be judged. The cases in the Second Circuit show that, to be subject to a claim of privilege, the relationship between the answer and the apprehended danger must be real, close, and direct.

The point is well illustrated by contrasting the decisions of that circuit in *United States* v. *Cusson, supra,* and *United States* v. *Flegenheimer,* 82 F. 2d 751 (C.A. 2). In the *Cusson* case, the court upheld the claim of privilege as to a question whether the witness had met "any of the Groves" during a visit to Philadelphia in February, 1941. It appeared that, at the time of her visit, two men named Groves were under indictment, that petitioner went to Mexico shortly before the Groves trial which took place soon after her visit and returned shortly after the conclusion of the trial, and that

the prosecutor had asked the witness whether she had been subpoenaed for the trial. The court sustained the claim that, in its setting, disclosure of a meeting with the Groves might serve as a link in establishing that they told her to go to Mexico to avoid being called as a witness, and that this would tend to prove that she had conspired to obstruct justice. On the other hand, in the *Flegenheimer* case, appellant, DiLarmi, had been called as a witness in the trial of Flegenheimer, under an indictment for evasion of income taxes, which alleged that the name Harmon was used as an alias by Flegenheimer, and that part of Flegenheimer's income was derived from a business for which a bank account was carried in the name of "Joseph Harmon and Rocco DeLarmi." DiLarmi claimed the privilege as to a question "Do you know Joseph Harmon?" The Court of Appeals upheld the refusal to recognize the claim, holding that if Harmon was an alias of Flegenheimer, an affirmative answer would have been no more than an admission that the witness knew the defendant. Even in the setting of a joint bank account in both names, the Court found that an admission of acquaintanceship would not be dangerous.

Similarly, in *O'Connell* v. *United States,* 40 F. 2d 201 (C.A. 2), involving a grand jury investigation of a lottery, the court rejected a claim of privilege to refuse to disclose whether the witness was acquainted with certain persons thought to be

connected with the lottery pool. It said that an answer of yes or no could have had no direct tendency to criminate the witness, apparently regard- it possible for the witness to explain such acquaintance innocently. On the other hand, in *United States* v. *Weisman,* 111 F. 2d 260, 263 (C.A. 2), the witness' refusal to answer whether he knew anyone who lived in Shanghai in the years from 1934 to 1939, or whether he received cables at a certain address, was upheld where it appeared that an indictment charging a conspiracy to import narcotics from China had been returned against others and that the Government had in Shanghai obtained copies of cables arranging for payment.

These cases, from the Court of Appeals which has adopted the broadest view of the scope of the privilege, illustrate that, even under so broad an approach, the "protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer" (*Hoffman* v. *United States,* 341 U.S. at p. 486), and that the danger must, in its setting, be substantial.[11]

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[11] The recent decision of the Second Circuit in *United States* v. *Rosen,* 174 F. 2d 187, certiorari denied, 338 U.S. 851, while representing a broad interpretation of this rule, is not a departure therefrom. The court found that, in the particular circumstances, questions as to Rosen's connection with a car formerly owned by Alger Hiss, might have connected him with a conspiracy to commit espionage.

B. In Determining Whether a Claimed Answer Would be Incriminating as a Link in the Chain of Evidence or as a Clue to Relevant Evidence, Great Weight Must be Given to the Decision of the District Court.

As appears from the discussion in point A, by whatever test the privilege of self-incrimination must be judged, there must be a finding of real, substantial danger to the witness from the answer. And the cases make it clear that, as this Court said in the *Hoffman* case, at p. 486:

> * * * The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified * * *.

In dealing with this situation of possible danger from an answer, two different questions may be involved. One is whether the witness is likely to give a particular answer which would be incriminating; the other is whether the possible answer, once it is assumed that the witness might have to give it, is such as to represent a danger to him.

Thus, if a witness is asked, "What is your business?", as was Hoffman, the claim of privilege involves speculation as to the answer. It is possible, as this Court pointed out in the *Hoffman* case, that a true answer would be that the witness is in a business involving evasion of federal laws. In that event, the mere assertion of the privilege must be given weight, and almost any circumstance

showing that the witness might give such an answer requires sustaining the claim of privilege. A very different situation, however, is present where the possible answers are limited. Thus, if a witness is asked "Are you in the numbers business?" his only possible answers are "yes" or "no." Neither answer would directly implicate the witness in a federal crime. Then the question is whether either answer could be a danger to the witness under the tests discussed above. It is then that the court must look at all the circumstances to determine not the possibility that a particular answer will be made, but to determine the reality of the danger from a particular answer, *assuming* that it will be made.

Chief Justice Marshall in the *Burr* case, *supra,* at pp. 39, 40 pointed out this distinction as follows:

> It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. For the witness who considers himself as being within this exception it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say upon his oath that his answer to that question might criminate himself.

When this opinion was first suggested, the court conceived the principle laid down at the bar to be too broad, and therefore required that authorities in support of it might be adduced. Authorities have been adduced, and have been considered. *In all of them the court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was at liberty to refuse an answer.* These cases do not appear to the court to support the principle laid down by the counsel for the witness in the full latitude in which they have stated it. *There is no distinction which takes from the court the right to consider and decide whether any direct answer to the question propounded could be reasonably supposed to affect the witness.* There may be questions no direct answer to which could, in any degree, affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. * * *

* * * * * * * *

When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would

> be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then * * * that if the question be * * * such * * * that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. * * * But, on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher, it appears to the court that the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact. [Emphasis added.]

This was the reasoning applied by this Court in the *Mason* case when it held that a question as to whether the witness was present at a gambling table must be answered. The only possible answers were "yes" or "no." And the Court decided that neither answer would be incriminating. See also the decision by Judge Taft in *Ex parte Irvine,* 74 Fed. 954, 960-965 (C.C. S.D. Ohio) and the de-

cisions by the Second Circuit in *United States* v. *Flegenheimer* and *O'Connell* v. *United States,* discussed *supra,* pp. 33-35.

Where the court must determine whether, considering all the circumstances, any possible answer by a witness can be deemed sufficiently dangerous to be incriminating, great weight must be given to the determination by the trial judge. As this Court said in the *Mason* case, 244 U.S. at p. 366:

> The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113, this Court said:

> * * * It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him * * *.

Judge Taft, in *Ex parte Irvine,* 74 Fed. at p. 960, summed up the rule thus:

> The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

While this Court, by overruling the District Court's determination in the *Hoffman* case, indicated that the ruling of the District Court is not in every case controlling, it did not suggest any modification of the rule of great deference to the trial judge's decision.

Moreover, the *Hoffman* limitation on the trial court's discretion must be read in light of the fact the Court did not know what Hoffman's answers would be, but could easily suppose possible answers which would certainly have been incriminatory. Accordingly, we conceive the rule still to be that the initial determination by the district judge who is familiar with the investigation must be given great weight, and that his determination will not be set aside unless it is based on incorrect principles of law, or is clearly erroneous on the facts. It is our position that the ruling in the instant case is a correct application of the governing rules of law to the particular facts of this case.

C. Under No Test of the Privilege Were the Telephone-Business Questions Asked Petitioner in This Case Incriminating.

Applying the principles of law discussed above, we do not believe that there was in this case a sufficient showing of real, substantial danger of incrimination to warrant sustaining the claim of privilege.

The telephone-business questions (quoted, *supra*, pp. 4-5) in effect asked of petitioner, "For what illegal business do you use your telephone?" On the surface these questions appear to be the same as the Hoffman business question, and would appear to involve speculation as to whether petitioner's answer might not involve an admission that he was engaged in a business violative of federal law.

However, petitioner's full statement of the basis of his claim (see Statement, *supra*, pp. 6-8, n. 3) negatives the possibility that his answer will involve the direct admission of illegal federal activities. Petitioner did not claim that his answer would show he was engaged in a business which is in itself illegal under federal law. He claimed only that an admission that he was in business, or in the numbers business, would tend to show that he had employees for whom he had not paid the taxes required by federal law. Thus he claimed the privilege, not on the basis of direct incrimination, but on the basis that the answer would be a "link in the chain of evidence" or a "clue" to relevant evidence. By his own statement, therefore, he has removed speculation as to his answer; he has shown

that his answer is either that he is in business or in the numbers business. Neither answer is directly incriminatory.[12]

It was thus for the district judge to determine, under the rules discussed above, whether an admission that petitioner was in business, or in the numbers business, represented such a substantial danger as to justify the claim of privilege. We submit that the ruling of the courts below that there was no danger is not clearly erroneous; it is in fact clearly correct.

It is apparent from petitioner's own showing that the tendency of an answer that he is in the numbers business, or in any other unlawful business, to show that he is an employer in that business is very weak. Petitioner himself testified (R. 25-26):

> * * * In the number business there are bankers. * * * And people who work for the bankers; who among other duties, compute the records as turned in by the pickup men and the number writers.

On his own statement, it appears that a person in the numbers "business" might be a banker, a writer, a pickup man, a computer, a bookkeeper,

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[12] This is very different from the situation before the Court in the *Hoffman* case, where, not only as to the business questions, but as to the *Weisberg* questions, the court could not tell what the answers might be. The Court had to assume that there could be answers which could be incriminating.

or, since the description does not purport to be exhaustive, he might do any number of other imaginable jobs. Only if he were a "banker" could it be argued that he might as a matter of fact have people working for him, and even then it would not be certain.

Moreover, even if people worked for him, in the colloquial sense of the word, it would not follow that they were "employees." Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111; *New Deal Cab Co.* v. *Fahs,* 174 F. 2d 318 (C.A. 5), certiorari denied, 338 U.S. 818; *Brady* v. *Periodical Publishers' Service Bureau,* 173 F. 2d 776 (C.A. 6). The studied efforts of those in illegal activities to keep their relationships distant should not be ignored in determining the permissible inferences from petitioner's admission.

Nor could the fact be ignored that common usage defines "business" to include any principal activity;[18] and in the great majority of cases it

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[18] Business is defined to include the following:

"• • •

"3. That which busies, or engages time, attention, or labor, as a principal serious concern or interest. Specif.: a. Constant employment; regular occupation; work; as, the *business* of living; *business* before pleasure. b. Any particular occupation or employment habitually engaged in, esp. for livelihood or gain. • • •

• • •

"7. A commercial or industrial establishment or enterprise; as, he sold out his *business;* also, custom; patronage; as, advertising secures *business:*"

Webster's New International Dictionary (Merriam-Webster, 2d ed. 1951), p. 362.

must be assumed that people who say they are in a particular "business" are not employers in that business. Indeed, an excellent example of such usage is given by petitioner himself. He admits that he is in the real estate business.[14] Some people in the real estate business have employees, others do not. Apparently, petitioner has no employees in that business, but is himself an employee of a real estate corporation (R. 218). His admission that he is engaged in that business has no logical tendency to show that he has employees. It is difficult for us to understand how an admission that he is in the numbers business or some other illegal business has any greater tendency in that direction.

Petitioner's admission that he is in business has less probative value to show that he was under a duty to pay federal employee taxes than Mason's presence at a gambling table had to show that he was gambling. Certainly it has none of the direct tendency to prove guilt that this Court found with respect to the Weisberg questions in the *Hoffman* case.

The lack of probative value becomes particularly apparent when considered in relation to the statute

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[14] The grand jury presentment (R. 6) shows that petitioner answered that he did not use the telephone "in any lawful business," and also shows (R. 7-82) that he was asked "Is it your real estate business you use it for? [referring to the phone at 1133 West Diamond Street]" to which petitioner replied "No."

under which petitioner claims he fears prosecution. Section 2707 of the Internal Revenue Code is designed to insure that, in specific identifiable employer-employee relations, the employer's tax obligations are discharged.[15] For this reason, an admission by petitioner that he is in the numbers business has no such relevance to prove any of the facts necessary to sustain a prosecution under Section 2707 as had the Weisberg admissions in the *Hoffman* case. A conviction simply could not be sustained on a showing that it was probable that a person who was in a particular kind of business might have employees. Nor, indeed, would it be of any value in determining whether an individual in fact had obligations under Section 2707 to know that he had activities in a field where some people have employees. The admission is barely more useful than an admission of a witness' name and address. Cf. *Ex parte Irvine, supra,* at 960 (C.C. S.D. Ohio); *Heike* v. *United States,* 227 U.S. 131, 142.[15a]

Equally, there is no merit in petitioner's alternative objection to the telephone questions that

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[15] Indeed, the only reported cases that have arisen under the section have been under its related civil liability provisions. See *Paddock* v. *Siemoneit,* 147 Tex. 571, 218 S.W. 2d 428; *In re Haynes,* 88 F. Supp. 379 (D. Kans.).

[15a] Contrast *United States* v. *Girgenti* (C.A. 3, February 6, 1952), in which the Court below sustained a claim of privilege under the social security and withholding tax laws where the witness's answer might have disclosed that he "operated" a gambling house which had at one time accommodated over 150 patrons, and had 12 employees.

disclosure of the business for which he uses the phone will show that he is in a business different from and in addition to the business listed on his income tax return for 1949. The fact that he is now in that business, he contends, will give rise to the inference that he was previously in that business, whereas on his previous return, the only entry of income, in addition to that from his "lawful" real estate business, was "Miscellaneous." On the basis of this, petitioner seems to suggest danger, either from his failure to show the source of his income properly, by saying "miscellaneous" instead of "numbers" or some other unlawful source, or from the possibility that he would also have to admit that he failed to return income from that other business.

As to the first fear, we are shown no authority which holds that it is a misstatement of a "material matter" to return as miscellaneous what is in fact income from an illegal business. Cf. *United States* v. *Sullivan*, 274 U.S. 259.[16] As to the second, it relates to questions about income from such a business which have not yet been asked.

The Second Circuit, which, as noted above, has taken a broad view of the privilege, disposed of a similar contention in *United States* v. *Weinberg*, 65 F. 2d 394 (C.A. 2), certiorari denied, 290 U.S. 675. In a grand jury hearing investigating viola-

[16] This is also the answer to petitioner's contention, not raised in this Court, that he may have violated the False Statements Statute (R. 132).

tions of the prohibition laws, the witness was asked his business in 1929 and 1930, and whether the signatures on two bank account cards in the names of Abe Berg and Jack Berg, respectively, were his. The court held that he was required to answer these questions and rejected his contention that, although the immunity statute protected him against prosecution for prohibition law offenses, it did not protect him against prosecution for offenses under the income tax laws. Judge Swan, for the court, stated:

> It may well be doubted whether a statement of what business the witness was engaged in, or whether a signature on a bank card was his, is not too remotely connected with a possible future investigation of his accounts and a prosecution for income tax evasion to justify his standing mute. Many additional facts have to be assumed before his answer, whatever it may be, can tend to implicate him in a violation of the tax laws.

It is also clear that, so far as petitioner is concerned, the admission that he is in the numbers business cannot provide any clues. It would be difficult to read the record here and not realize that everybody knows that petitioner is in the numbers business. Petitioner all but admits it himself. (See, e.g. R. 49.)[17] He was not asked whether he

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[17] Petitioner offered to prove by the testimony of the Special Assistant to the Attorney General that " * * * all of the information contained in his file * * * would definitely establish

is in the numbers business to give the government any leads.

It seems evident that, as the court below held, petitioner fears, not the answers to the questions actually asked, but to the prospective questions not yet asked, which he assumes will follow. That is not a ground on which to base a claim of privilege. This Court said in *Rogers* v. *United States*, 340 U.S. 367, 374:

> As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a "real danger" of further crimination.

If petitioner, after admitting that he was in the numbers business, was asked whether he had employees, he might then have legitimately claimed his privilege. He could not, on this anticipatory basis, fail to answer a question which of itself lacked, under any standard, a substantial danger of incrimination. See *United States* v. *Flegenheimer*, 82 F. 2d 751 (C.A. 2), discussed *supra*, where the Second Circuit held that the witness should have answered whether he knew the Harmon whose name appeared with his own on a joint account. The Court stated that it did not have to

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the unlawful business in which Irving Greenberg is in and concerning which there has been some testimony," and further that the answers to the questions in issue "* * * are not only known to the United States Government but are known to this witness who is at present on the stand."

decide whether the witness could be questioned about the bank account, because no question in regard thereto had been posed.

Thus, in their setting, the telephone-business questions were not incriminating in themselves, as links in the chain of evidence, or as clues to evidence. Petitioner could not properly refuse to answer these questions since they exposed him, at most, only to an anticipatory conjectural danger.

D. Under No Test of the Privilege Were the Identity Questions Incriminatory.

Petitioner does not contend that the disclosure of the names of numbers writers known to him around 1133 West Diamond Street could amount to a direct admission of crime. Cf. *O'Connell* v. *United States,* 40 F. 2d 201 (C.A. 2). He argues that the answer to the question on this issue would amount to a "link in the chain of evidence" against him. We think it is evident, however, that such disclosure would not have the probative value which is required under the decisions of this Court. It is difficult to imagine the use of this disclosure, as such, as part of any case against petitioner. His knowledge of the names of the numbers writers would, of course, be consistent with his being their employer, but it would be equally consistent with many other relationships. Indeed, petitioner himself calls attention (Pet. 3-4) to the following series of questions asked petitioner by the grand

jury, which he had at first refused to answer (R. 3):

> 6. Q. Do you know an address 1133 West Diamond Street?
>
> 7. Q. Do you know whether there is a tailor shop there?
>
> 8. Q. Is that a cleaning and pressing shop at that address?
>
> 9. Q. Do you know a man by the name of L. J. Perry?
>
> 10. Q. Did you ever meet Willie Weisberg there?
>
> 11. Q. Did you ever meet Cappy Hoffman there?

These questions suggest strongly that both Hoffman and Weisberg may have had dealings at that address. It is certainly reasonable to assume that at least some of the people, who would be in the vicinity of 1133 West Diamond Street and who might have been known to petitioner as numbers writers, were not his employees.

And even if the persons named by petitioner were in fact his employees, the particular admission sought would have no significant tendency to establish the fact, because of the equally permissible inferences from the answer that the persons named were simply people with whom petitioner dealt at arm's length in carrying on his numbers activities. As we pointed out above, under its

broad construction of the privilege, the Second Circuit has held that an admission of acquaintanceship would normally be too colorless to be deemed dangerous. *United States* v. *Flegenheimer,* 82 F. 2d 751; *O'Connell* v. *United States,* 40 F. 2d 201. Only under very special circumstances, such as those present in the *Weisman* case (see *supra,* p. 35) can danger be inferred from acquaintance. Such circumstances were present where the question concerned the clandestine, conspiratorial group involved in *Blau* v. *United States,* 340 U. S. 159. In those special situations, mere admission of dealings took on color of guilt. Here, knowledge of numbers writers was in itself colorless as to offenses under federal law.

The fact that petitioner knows numbers writers who come to a particular address may have some tendency to show that petitioner is in the numbers business; it does not tend to show that the persons who come there are his employees. Petitioner's acquaintance with numbers writers is no more suggestive of guilt than O'Connell's acquaintance with members of the pool or DiLarmi's acquaintance with Flegenheimer under the alias of Harmon (see pp. 34-35, *supra*).

A more plausible contention is the suggestion (on which petitioner disclaims the necessity of relying, Pet. 17, n. 13), that disclosure of the names of numbers writers has incriminatory possibilities,

not as evidence, but as a clue to evidence.[18] It is possible that some of the numbers writers may be employees and that they could then be called as witnesses to show that petitioner has employees.

As discussed above, pp. 27-32, this Court has not held that an admission which of itself would not be sufficiently incriminating to be relevant evidence at a trial, may be deemed subject to the privi-

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[18] It should be noted that this particular basis for the claim of privilege was expressly articulated in this form, not by petitioner himself under oath, but by petitioner's counsel in the course of oral argument prior to the filing of the presentment. Petitioner's "full statement" under oath refers generally to the claim that the answers would incriminate him under federal Internal Revenue laws, to his fear that an admission, that he was in a business other than his legal business and had employees, would incriminate him, and to his reliance on advice of counsel (See Statement, *supra*, pp. 6-8, n. 3). Nowhere did petitioner, under oath, claim that disclosure of the names of numbers writers would furnish the names of witnesses against him. As it was not under his oath, the claim cannot subject him to the penalty of perjury which is perhaps the only lever a court has to assure that the privilege will not be abused more than is necessitated by its nature. This is a factor which a court, ruling on the claim of privilege, may take into consideration in determining whether the claim of danger has been seriously advanced, or indeed, has been advanced at all. Particularly is this true where the specific assertion would not expose petitioner to further danger.

Moreover, it ought also to be noted at this point that the statutory references in petitioner's "full statement" to Section 1625(a) and to Section 1626(a), (b), and (c) do not represent the full basis of petitioner's statutory reliance here. If his claim were limited to those sections, there would clearly have been no criminal liability at the time he testified.

lege simply because it may provide a clue to relevant evidence. In this case, as we have shown, petitioner's admission that he knew numbers writers at a certain address would not have any relevance to prove the federal charges on which he fears prosecution. Hence, on our interpretation of the privilege, he could not refuse to answer the identity questions on that basis.

But even if the "clue" standard is applicable, we do not believe that the danger here is sufficiently close to render the identity questions subject to the claim of privilege.

Petitioner flatly refused to disclose the names of any of the numbers writers whom he knew in the vicinity of 1133 West Diamond Street. It is perfectly obvious on this record that all of the numbers writers around that address whom petitioner might happen to know will not be his employees. Some may be. Some most certainly will not be. Of those who are not his employees, there may be those who know if he has employees, and those who will not. There may indeed be those who would testify that he has no employees. Of those who know or suppose that he has employees, there may be those who know who these employees are, and there will surely be those who do not. Those who think they know may have no valid basis for that supposition.

In short, the gap between petitioner's acquaintanceship with numbers writers at the Diamond

Street address and the Government's ability to use that fact as a source of evidence against petitioner for a federal crime is too great to meet the test of danger which even the cases construing the privilege most broadly have required. (See *supra,* pp. 32-35.)

As the Second Circuit said in *Abrams* v. *United States,* 64 F. 2d 22, in holding that a witness before a grand jury investigating election frauds could not refuse to answer (1) where he lived after he said the address already given was not correct, (2) whether he was the Democratic captain of a certain election district in New York City, (3) where the polling place for that district was at the last election, (4) whether he was present there at that time, (5) whether he was acquainted with persons who acted as inspectors at that last election, (6) whether he filed a report with his district leader of the result of the vote cast at that election, and (7) whether he was present at any other polling place on the election day in question:

> * * * it may be noticed that no answers to these questions could reasonably be thought to have furnished leads to evidence which would tend to prove him guilty of a crime unless we are prepared to go the length of saying that in every criminal investigation the Constitution permits every person to remain silent, if he chooses, merely on the off chance that if he opens his mouth he will say something to indicate that he has committed some crime.

E. If Any Question Should Have Been Answered the Judgment Should Be Sustained.

We believe that petitioner could not properly refuse to answer any of the questions on which the judgment was founded. But if his refusal is found to be improper as to any one, the judgment should be affirmed. The sentence of five months' imprisonment was a general sentence which was within the court's discretion to impose if petitioner was properly held in contempt in any respect. See *Pinkerton* v. *United States,* 328 U.S. 640, 641, n. 1; *Hirabayashi* v. *United States,* 320 U.S. 81; *Blau* v. *United States,* 340 U.S. 332, 335 (dissenting opinion).

This is a matter of some importance to the Government. The constant interference with the grand jury process of contumacious refusals to answer cannot be controlled unless the courts are willing to evaluate each question on its own merits, and to refuse to permit the witnesses to profit by the fortuity that they could find one question where the Government stepped over a nearly invisible line. Cf. *O'Connell* v. *United States, supra.*

II

Whatever Variance There Might Have Been Between What the District Judge Orally Found and His Formal Written Judgment Was Immaterial and Did Not Prejudice Petitioner

Petitioner contends that the formal judgment varied from the judgment pronounced in court (the latter, he says, being "a general finding of guilty") in that it omitted to find him in contempt

(1) for refusing to answer the question, "Are you in the numbers business now," and (2) for obstruction of justice (Pet. 18-19). Consequently, he argues, (a) that "to the extent that the [formal judgment] varie[d] from what was said in court, it is utterly void" (Pet. 19), and (b) that, "whereas the sole emphasis at the trial was on petitioner's alleged violation of 18 U.S.C. 401(1) [obstruction of justice], the gravamen of the formal judgment and commitment and of its affirmance on appeal was his violation of 18 U.S.C. 401(3) [disobedience of the court's order]," with the result that there was "a deprivation of due process" under the "rule that a man shall not be charged with one crime and convicted of another" (Pet. 21).

The presentment, as amended at the trial, charged petitioner with violating both subsections (1) and (3) of 18 U.S.C. 401 [19] in refusing to answer the three questions referred to in the formal judgment and also the question, "Are you in the numbers business now," and the trial proceeded on the understanding that he was being tried for refusing to answer these four questions (R. 10-14). *Prima facie,* the formal judgment rather than a

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[19] And we find nothing in the record to support petitioner's assertion that "the sole emphasis at the trial was on petitioner's alleged violation of 18 U.S.C. 401(1)." Consequently, his contention that he was deprived of due process by being charged with one crime and convicted of another is wholly without factual basis.

statement in an opinion or a docket entry is the judgment of the court. *United States* v. *Hark*, 320 U.S. 531, 534-535. The controlling factor, however, is the intent of the judge at the time sentence is pronounced. *Wilson* v. *Bell*, 137 F. 2d 716, 720 (C.A. 6); *Watkins* v. *Merry*, 106 F. 2d 360, 361 (C.A. 10). Cf. *Miller* v. *Sanford*, 161 F. 2d 291 (C.A. 5),[20] certiorari denied, 332 U.S. 774. The oral statements of the District Court that petitioner was "adjudge[d]" "in contempt of court" (R. 65) and sentenced "for violation of criminal contempt" (R. 71) did not unequivocally indicate an intention to find him in contempt in all respects as charged in the presentment. The court did not state that petitioner was found guilty as charged. This ambiguity in the oral pronouncement of the court was, therefore, clearly resolved by its formal judgment.

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[20] P. 292: "As to the contention that the docket entry made by the judge of the sentence in the Southern District of Texas overrides the sentence which he signed, it is true that at common law sentence was orally pronounced by the judge and taken down by the clerk in the minutes, which were later signed by the judge as a whole. The docket entry was only the memorandum of the judge, and not the record of the sentence. The practice in the federal courts was changed on May 24, 1937, by an amendment of Rule 1, Procedure in Criminal Cases after Verdict, to require: 'The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.' 301 U.S. page 717. Here the sentence as signed by the judge was the effective sentence. It is needless to enquire whether the docket entry does not mean the same thing, as appellee contends."

But even if the oral finding did find petitioner in contempt in every respect as charged in the presentment, the omission in the formal judgment of some of the specifications embodied in the oral pronouncement was not detrimental to him, but rather to his benefit, for such omissions constituted, in effect, a vacation of part of the judgment. A vacation of the judgment as to the charge of violation of 18 U.S.C. 401(1) would not render the judgment void or give petitioner cause for complaint as to a violation of 18 U.S.C. 401(3). Likewise, a vacation of the judgment of contempt of court for refusing to answer one question would not invalidate the judgment of contempt for refusing to answer the other questions. Cf. *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States,* 320 U.S. 81, 85; *Irving Blau* v. *United States,* 340 U.S. 332, 335 (dissenting opinion).

In respect of the question, "Are you in the numbers business now," we think it unimportant in any event whether the judgment was in part based upon petitioner's refusal to answer it, for it involves the same problems under the Fifth Amendment as the questions concerning the business in which petitioner used the telephone (see discussion, *infra,* pp. 42-50).[21]

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[21] We see no basis in fact for petitioner's contention that the Court of Appeals dealt with this question, or with petitioner's guilt of obstruction of justice, in its second opinion on the remand. See footnote 5, *supra.*

III

The Record Shows That Petitioner Disobeyed Orders of The District Court in Connection With the Questions Here Involved

Petitioner further contends that there was "no proof either of any order by the district court or of any disobedience of any such order" (Pet. 13-15). On the contrary, the record does contain such proof.

Petitioner had been brought before the court for the very purpose of securing an order compelling him to answer the questions, and there were extensive hearings on the issue whether such an order should be granted. Petitioner was represented at the hearings by counsel who argued at great length that the answers to the questions would incriminate him. During the seventh day of these hearings, on October 30, immediately following an argument by petitioner's counsel on the alleged incriminating character of the identification question, the court said, "I don't see here where there is any direct tendency to incriminate him. It may involve number writers, but I won't bridge that gap. I am directing him to answer who they are." (R. 231.) To this petitioner's counsel excepted, indicating that he understood it to be an order. Later that day the court suggested that, since all the "repeated refusals to answer concern itself with the basic question 'Are you in the numbers business' " and "since counsel [for petitioner] have chosen to make their stand" not to answer it, an appeal

be taken only on that question (R. 145-146). But this suggestion was not acceptable to government counsel. Mr. Goldschein stated that he thought he might eventually get the answer (R. 145) and that his position was "simply this. At first [petitioner] refused to answer quite a string of questions. The Court compelled him to answer. Of course we can't anticipate which questions [if he is ordered to answer them] he will or which questions he won't," with which the court agreed, stating, "That is right" (R. 146). And later that day the court announced its order, stating, "I am going to rule [22] here, that these questions have to be answered * * * " (*ibid.*).[23] It is clear that petitioner's counsel understood this ruling to be an order that petitioner answer the questions before the grand jury, for following it there occurred a colloquy concerning the time when petitioner should again go before the grand jury (*ibid.*), and petitioner's counsel (while arguing for a ruling on his request for the grand jury minutes and government files) said, "we are one day before, let us say, the contempt proceeding, or two * * * " (R. 147). There is no suggestion anywhere in the record that petitioner or his counsel did not fully understand

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[22] The statute under which petitioner was convicted, 18 U.S.C. 401, *infra*, p. 83, provides for punishment for contempt of the court's authority in disobeying its lawful "writ, process, order, rule, decree, or command."

[23] This part of the record of the hearing of October 30 was admitted into the record of the contempt trial (R. 14-15).

that petitioner was ordered to answer the questions before the grand jury.[23a]

Petitioner admitted at the trial that he had refused to answer before the grand jury the questions set forth in the presentment (R. 10-14), which were the ones that he had been ordered to answer, and, accordingly, that he had disobeyed that order. Furthermore, when the court offered him an opportunity to purge himself by answering the questions, his counsel stated, "We take the same position we have taken before" (R. 65), thereby indicating that petitioner would continue to refuse to answer them and, accordingly, to refuse to "obey the Order of this Court," as the judgment recited (R. 201).

IV

Petitioner Was Not Entitled to Subpoena Either the Government's Records or the Grand Jury Minutes

On October 17, 1950, petitioner issued a Subpoena Duces Tecum directed to Max H. Goldschein, Special Assistant to the Attorney General, to bring

> * * * all records concerned with investigation of Irving Greenberg, and used in connection with the examination of Irving Greenberg as a witness before the Grand Jury, and with the examination and questioning of other witnesses who have appeared before the Grand Jury and have testified about Irving Greenberg.

[23a] Indeed, the trial court found that petitioner had been instructed to answer the questions in issue. See R. 199-201.

The United States filed a motion to quash this subpoena. Petitioner maintains that the District Court erred in refusing him access to the grand jury minutes and government files concerning the grand jury's investigation (Pet. 21-25). In order to determine whether this action of the District Court was proper it is necessary to examine its rulings with regard to those minutes and files.[24]

After *United States* v. *Zwillman*, 108 F. 2d 802 (C.A. 2), had been called to the court's attention both in oral argument and briefs, the court, on October 19, deferred ruling on the question whether it would force the Government to expose its files and the grand jury minutes until petitioner had made a showing that he was "in reasonable apprehension," which would give the court some "criterion" on which to decide whether it had "any right to request the Attorney General to produce the records" (*supra*, p. 10, R. 111). On October 30, when the matter was again called to the court's attention, it asked petitioner's counsel if he was going to offer some showing (R. 147). And on the next day, October 31, no showing having been made,[25] the

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[24] The Court of Appeals said (R. 238-239): "the court did not err in refusing appellant access to the grand jury minutes and to the files of the government."

[25] At this point, the only evidence petitioner had offered was a statement by himself that he believed the answers would incriminate him under the federal revenue laws and a like statement by his counsel (*supra*, pp. 6-8, n. 3). At his con-

court said, "Now, I say to you with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate. * * * You will put this man on the stand, Greenberg, if you want to, if you see fit. * * * We will not divulge Grand Jury proceedings to you or to any other counsel or anybody else. When and as you make some showing that this defendant, that this witness is in reasonable danger of incriminating himself to the satisfaction of this Court, I will then decide whether or not this is the fact, or if there is some showing that he reasonably might be put in danger, then I will decide whether or not they may be inspected, but until that showing has been made, you will not see any Grand Jury proceedings. * * * Until you make some showing you will not see those records" (R. 150-151). When petitioner's counsel again renewed this request, on November 1, the court repeated its earlier ruling, stating, "I told you, and now again, that I will on a proper showing * * * " (R. 190). And at the contempt trial, on Novem-

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tempt trial, on November 3, petitioner further testified that he had not filed social security and withholding tax returns during 1950, and he introduced newspaper articles indicating that the Government intended "to strike indirectly at racketeers" "through the Federal revenue and conspiracy laws" and a statement by himself that bankers in the number business had employees (*supra*, pp. 9-10).

ber 3, the court said, "The motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made" (*supra*, p. 12, R. 53).

1. The right to refuse to disclose criminatory matter is not absolute. It was recognized very early that the privilege of the witness not to criminate himself conflicted with the right of the community to the testimony of every man. In *United States* v. *Burr, supra,* Marshall, C. J., said (at pp. 39-40):

> * * * The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, *can neither of them be entirely disregarded.* They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule, *and of the exception to that rule,* by observing that course which it is conceived courts have generally observed. * * * [Emphasis added.]

Although the privilege is expressive of a principle deeply rooted in our history, see 8 Wigmore, *Evidence* (3d ed., 1940) § 2250; Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 Va. L. Rev. 763, and although it must be construed broadly to accomplish its purpose, *Counselman* v. *Hitchcock, supra,* at p. 562, it has never been doubted that it represented an interference with

legitimate investigative efforts. Consequently, the privilege has always been construed sufficiently narrowly to prevent its abuse. Cf. *Mason* v. *United States, supra; Heike v. United States, supra; Abrams* v. *United States, supra,* at pp. 24-25; see also, *United States* v. *Sullivan, supra* (which shows that a person will not be permitted to draw a wide circle around possible crimination).

The grand jury process, on the other hand, is an established and appropriate technique for supplementing governmental investigation. See Dession and Cohen, *The Inquisitorial Functions of Grand Juries,* 41 Yale L. J. 687. The need for secrecy in its functions is imperative. See *Hale* v. *Henkel,* 201 U.S. 43, 59. The reasons for this were clearly spelled out, in part, in *Goodman* v. *United States,* 108 F. 2d 516, 519 (C.A. 9), as follows:

> Grand juries have been aptly characterized as "the voice of the community accusing its members." In re Kittle, C.C., 180 Fed. 946, 947. From earliest times it has been the policy of the law to shield the proceedings of these bodies from public scrutiny, and to this end the grand jurors themselves have always been sworn to keep their own counsel and that of the state or of the King. * * * In part the purpose is to protect grand jurors, complainants and witnesses, so that the jurors may deliberate and vote without fear that their conduct will be disclosed elsewhere, and that those who

testify may feel free to speak the truth without reserve. Other reasons for the rule are that if the accused should learn that his conduct is under investigation he is likely to flee arrest or to tamper with witnesses; and that one who is unjustly accused, but is exonerated by the refusal of the grand jury to indict, may not suffer injustice by a disclosure that he has been under investigation for the commission of a crime.

Further, the evidence taken before grand juries is confidential matter, to which the accused person has no right of access. Metzler v. United States, 9 Cir., 64 F. 2d 203; United States v. American Medical Ass'n, D.C., 26 F. Supp. 429; United States v. Providence Tribune Co., D.C., 241 Fed. 524; State v. Broughton, 1846, 29 N.C. 96, 7 Ired. 96, 45 Am. Dec. 507.

In these circumstances, the propriety of Rule 6(e) of the Federal Rules of Criminal Procedure protecting the secrecy of the proceedings seems clear. The Rule provides:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may dis-

> close matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

It permits examination into the minutes only when the defendant has made an adequate "showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

It was the position of the District Court, and we think it correct, that petitioner never made any such showing. Petitioner made an extensive offer of proof (R. 48-53) which indicates the purpose for which he wanted both the minutes of the grand jury and other records in the hands of the Special Assistant to the Attorney General who was aiding the grand jury in its investigation. In no respect does it amount to the kind of showing required by Rule 6(e).

Thus, petitioner's counsel stated:

> I purpose to prove by this witness that there were hundreds or perhaps over a thousand questions asked of Irving Greenberg before

the Grand Jury, and that he has answered every one of those questions with the exception of the three or four questions which are presently before Your Honor.

I purpose further to show by this witness that other witnesses who appeared before the Grand Jury were asked concerning this witness, Irving Greenberg.

I also intend to show by this witness that Irving Greenberg himself is being investigated and was during the course of this Grand Jury by the United States Government.

I purpose to show that this witness knows that Irving Greenberg was the subject of an investigation by the United States Government prior to the calling of this Grand Jury, and that the very questions for which he is now on trial for contempt, that the answers to those questions are not only known to the United States Government but are known to this witness who is at present on the stand.

I also purpose to show that to substantiate that knowledge there is in the possession of this witness * * * all of the information contained in his file which would definitely establish the unlawful business in which Irving Greenberg is in and concerning which there has been some testimony.

* * *

> I purpose to ask this witness to produce the record for which he was subpoenaed and for which there was a subpoena duces tecum commanding him to appear and bring with him all records concerned with the investigation of Irving Greenberg as a witness before the Grand Jury, and in connection with the examination and questioning of other witnesses who have appeared before the Grand Jury and who have testified about Irving Greenberg.
>
> If this witness shall have produced those records, then, of course, I would be governed by a further offer of proof as to what those records revealed and asking him further questions.

It seems to us that petitioner's own statement negatives the importance of his asserted right to the grand jury minutes. Except for the last mentioned offer, which rather blandly concedes that petitioner wanted to go on a "fishing expedition," the minutes would add practically nothing. Compare *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221.

A court, in passing on claims of privilege is required to determine only whether an incriminatory answer is possible. And we have already indicated, in urging that the privilege is not available here, the factors that in this case make the apprehended danger remote and fanciful. Nothing in the grand jury minutes could have added

substance and concreteness to the claim of danger.

2. Moreover, so far as petitioner's request was for the right to peruse the grand jury minutes, none of the cases on which he relies sustains his view. In all of them the information sought to be obtained was specific. In *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2), the data sought were reports prepared by the defendants themselves and turned in to the Government. The defendants had been indicted for bribery and they sought to show by these reports that their earlier dealings with the outside persons involved had been honest. The pin-pointed effort to get these data contrasts sharply with the generalized search apparently contemplated here.

In *United States* v. *Beekman*, 155 F. 2d 580 (C.A. 2), the defendant, under prosecution for violation of Office of Price Administration regulations sought to challenge the impartiality of the principal witnesses against him by subpoenaing OPA records which would have shown that these witnesses had themselves been disciplined by the OPA for overcharges. Again, this was no random search for whatever might turn up. Nor was it a search to develop facts which were demonstrably not relevant.

Equally specific was the demand in *United States* v. *Grayson*, 166 F. 2d 863 (C.A. 2). That was a prosecution for fraudulent use of the mails and for violation of the Securities Act by making gross

misrepresentations about the value of certain oil royalties. Defendant sought to introduce certain "Sales Reports" filed with the Securities and Exchange Commission showing the prices at which royalties in these tracts had been sold to others in earlier years. The Court of Appeals for the Second Circuit held it was reversible error to refuse to admit this testimony. Cf. *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2).

But again, there was no random search for data. Moreover, there is a wide difference between departmental regulation and the long history of secrecy in grand jury investigation. It is true that a superficial reading of *United States* v. *Zwillman*, *supra*, suggests that the Second Circuit recognizes no difference. However that may be, we think it is clear that the *Zwillman* case does not conflict with the decision below. The ruling of the District Court in that case "that only the questions [which the defendant had refused to answer] themselves were material in a proceeding to punish for contempt" (108 F. 2d at 804) is in striking contrast to the rulings of the District Court in this case. As we have shown, the District Court repeatedly indicated that petitioner could introduce other evidence to show the necessity for disclosing the grand jury minutes and government files and it afforded him full opportunity to show by his own evidence that the answers to the questions would tend to in-

criminate him.[26] In the *Zwillman* case, on the other hand, the court, on the objection of the Government, excluded all evidence offered by the defendant, including the grand jury proceedings (108 F. 2d at 803), and "he was warned by the court that nothing was relevant on the presentment for contempt except the questions which he had refused to answer" (*id.*, at 804). We think that in the part of the Zwillman opinion upon which petitioner relies (Pet. 23)[27] the court was referring to the entire conduct of the Government in securing the exclusion of all evidence offered by the defendant, rather than only the grand jury proceedings. Certainly that language must be read in the

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[26] See R. 185: "Mr. Witkin. • • • In other words, I don't think either Mr. Goldschein, and I know Your Honor wouldn't presuppose to tell us what evidence we ought to present.

"The Court. I certainly would not."

[27] 108 F. 2d at 803-804:

"It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby, deprived him of his right to a proper trial where he could offer evidence in his defense."

light of the facts of the case. The court's conclusion that the Government "could not put [the defendant] in contempt" was limited to the situation before the court, i.e., where the Government "chose to * * * confine the defendant's defense only to showing that the questions asked were incriminatory on their face * * *." Since the exclusion of grand jury proceedings could not alone have that effect, the decision does not support petitioner's contention that he was entitled to see the proceedings in preparing his defense.

3. The advisor's notes to Rule 6(e) make it clear the matter was to be left to the discretion of the district courts. It mentioned earlier decisions which had worked out this rule. *Schmidt* v. *United States,* 115 F. 2d 394 (C.A. 6); *United States* v. *American Medical Association,* 26 F. Supp. 429 (D.D.C.). Each of these cases shows, however, that the importance of the requirement of grand jury secrecy required a strong showing be made before disclosure would be allowed. In *United States* v. *American Medical Ass'n, supra,* defendants, under indictment, moved for court approval of their right to interrogate members of the grand jury which returned the indictment, and the right to examine the transcript of the grand jury proceedings with a view to discovering whether there was misconduct by government counsel or incompetent or irrelevant evidence introduced, all of which, if found, might be used by the defendants to vitiate

the indictment. One of defense counsel by affidavit alleged that he had been informed by various defendants and believed that attorneys for the Government presented irrelevant testimony to the grand jury, advised it as to the law, and requested and persuaded it to return the indictment; and that certain members of the jury had indicated a willingness to discuss this except for uncertainty as to their right. The court reviewed the compelling reasons for the grand jury secrecy rule and concluded that defendants were not entitled to relief. It stated, at 430-431:

> * * * there is no question of a court's power to go back of an indictment to inquire whether vitiating irregularities induced the finding. * * * But it is a power sparingly used; justified only where by proper verified pleading a clear and positive showing is made of gross and prejudicial irregularity influencing the grand jury in returning an indictment. Averments on information and belief have been uniformly held not enough. * * * Thus we have the novel situation of defendants admitting that they are in no position to file the essential pleading to justify the court in making an inquiry, yet nevertheless asking that the inquiry be ordered anyway, in the expectation or hope that material will turn up to support a proper plea. Manifestly the court ought not grant such a motion. * * * The effect * * * would be to

> break down all legal checks against technical, dilatory tactics. The strong presumption of the regularity of grand jury proceedings would no longer prevail. Cox v. Vaught, 10 Cir., 52 F. 2d 562. Every accused could upon the flimsiest pretext enlist the court's aid in a "fishing expedition," to discover some supposed irregularity to use as a basis for dilatory action; to cull over the evidence and get the government's case against him in advance of trial; to divert and turn back the course of a criminal case from a trial of himself to a trial of the grand jury and the prosecuting officers. * * * There could be no effective way of guarding against the manifold abuses that such a practice would encourage. The defendants complain that with the lips of jurors sealed and the transcript closed to them they cannot obtain the true facts except by aid of the court. But it must be remembered that sound reasons of public policy in the administration of justice lie back of the rules which forbid free access to these channels of information. * * *

We think that this case is a sufficient answer, perhaps more than sufficient, to all the objections of substance or policy which petitioner has made.

Schmidt v. *United States, supra,* also cited by the revisers of the rules, was a contempt proceeding against two attorneys, among others, for advising that it was proper for certain grand jurors

to violate their oaths of secrecy by signing certain affidavits disclosing what happened during the grand jury deliberations leading up to indictments of the attorneys' clients. After reviewing carefully the factors requiring secrecy of grand jury proceedings, and citing the *Goodman* case, *supra*, the court also pointed out the objections to the rule of secrecy. It then observed, at p. 397:

> It follows that the public interest in maintaining the secrecy of the grand jurors' deliberations and the interest of the accused in exposing them may often be in direct conflict. The responsibility of evaluating these conflicting considerations in the interest of truth and justice is a delicate one. It is unthinkable that the decision should be left to the bias of an accused or his counsel, or to the inexperience of a juror. Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its "judicial inquiry."

It is clear that the court's exercise of discretion here was proper.

4. The problem is not basically different when we deal with the petitioner's contention that he was entitled to examine all of the information in the prosecutor's files relating to him. By statute (5

U.S.C. 22, R.S. 161) the head of each department is authorized to prescribe, among other things, regulations not inconsistent with law, for the conduct of its officers and the execution, use, and preservation of its records, paper and property.

Pursuant to the authority vested in him by this statute the Attorney General of the United States issued Order No. 3229—Department of Justice, which provides:

> Pursuant to authority vested in me by R.S. 161 (U.S. Code, Title 5, section 22), It is hereby ordered:
>
> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a *subpoena duces tecum* is served to produce any of such files, documents, records or information, the officer or employee

on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein on the ground that the disclosure of such records is prohibited by this regulation. [11 F. Reg. 4920—May 4, 1946, 11 F. Reg. No. 177, Part II, Page 177A—107 Sec. 51.71, Sept. 11, 1946].

The validity of the regulations promulgated by the various executive departments under and by virtue of this statute is well settled by decisions of the federal courts.[28] Such regulations have the force of law and the courts have no jurisdiction or power to punish departmental employees for conforming.[29] Departmental records and documents

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[28] *Boske* v. *Comingore*, 177 U.S. 459; *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *In re Lamberton*, 124 Fed. 446 (W.D. Ark.); *Stegall* v. *Thurman*, 175 Fed. 813 (N.D. Ga.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky.); *Walling* v. *Comet Carriers*, 3 F.R.D. 442 (S.D. N.Y.); 25 Op. Atty. Gen. 326; 29 Op. Atty. Gen. 555.

[29] *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462; *Boske* v. *Comingore*, *supra*; *Ex parte Sackett*, *supra*; *In re Huttman*, 70 Fed. 699 (D. Kans.); *In re Weeks*, 82 Fed. 729 (D. Vt.); *In re Lamberton*, *supra*; *Stegall* v. *Thurman*, *supra*; *Harwood* v. *McMurtry*, *supra*; *Fleming* v. *Bernardi*, 1 F.R.D. 624, 4 F.R.D. 270 (N.D. Ohio); *United States ex rel. Tennessee Valley Authority* v. *Neal*, 45 F. Supp. 382 (E.D. Tenn.); *Walling* v. *Comet Carriers*, *supra*; *United States* v. *Potts*, 57 F. Supp. 204 (M.D. Pa.).

which are of such a character that their production would be harmful to governmental operations or to public interest [30] have long been regarded as privileged.

The offers of proof, *supra*, pp. 68-70, indicate that these materials were to be culled in much the same fashion that petitioner wanted to cull the grand jury minutes. We have already urged that on the facts, the specific offers were of no importance because the court's ruling had already comprehended them. And so far as the Second Circuit decisions sustain some right to compel the Government to disclose certain kinds of information or forego its prosecution, it has no application to a broadside request.

It will perhaps suffice to indicate the policy considerations implicit on this phase of the case to note some language of Learned Hand, *J.*, used in 1923 in *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D.N.Y.):

> Finally, the defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible, move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. U. S. v.

---

[30] *Vogel* v. *Gruaz*, 110 U.S. 311, 316, an action for libel, citing with approval *Worthington* v. *Scribner*, 109 Mass. 487; *In re Quarles and Butler*, 158 U.S. 532, 535, 536 (holding as privileged information to government officials concerning alleged violations of law.

Violon (C.C.) 173 Fed. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

MAX H. GOLDSCHEIN,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

MARCH, 1952

APPENDIX

Constitutional Provision and Statutes and Regulations Involved

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Internal Revenue Code:

Section 145 (c):

> Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony * * *

Section 1400:

> * * * there shall be levied, collected, and paid upon the income of every individual a tax

equal to the following percentages of the wages * * * received by him * * *

Section 1401 (a):

The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

Section 1430:

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 * * * shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.

Section 1622 (a):

Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to the sum of the following: * * *

Section 1625 (a):

Every employer required to deduct and withhold a tax in respect of the wages of an employee, or who would have been so required if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of his employment during the calendar year, on or before January 31 of the succeeding year, or, if his em-

ployment is terminated before the close of such calendar year, on the day on which the last payment of wages is made, a written statement showing the wages paid * * * and the amount of the tax deducted and withheld * * *.

Section 1626 (a):

In lieu of any other penalty provided by law (except the penalty provided by subsection (b) of this section), any person required under the provisions of section 1625 to furnish a statement who willfully * * * fails to furnish a statement in the manner, at the time, and showing the information required under section 1625, or regulations prescribed thereunder, shall for each such failure, upon conviction thereof be fined not more than $1,000, or imprisoned for not more than one year, or both.

Section 1626 (b):

In addition to the penalty provided by subsection (a) * * * [there shall be] a civil penalty of not more than $50.

Section 1627:

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.

Section 2707:

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Regulations:

The pertinent portions of 26 C.F.R. 402, Employment Taxes, provide:

402.601 Tax and Information Returns

Every employer shall make a tax and information return on Form SS-1a for the first quarter after December 31, 1939, within which wages are paid to his employee or employees, and for each subsequent quarter (whether or not wages are paid therein) until he files a final return as required by the provisions of Section 402.603. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form SS-1a. One original return shall be filed with the collector. For purposes of returns under the Act, the quarters shall each be three calendar months as follows: (a) from January 1 to March 31, both dates inclusive; (b) from April 1 to June 30, both dates inclusive; (c) from July 1 to September 30, both dates inclusive; and (d) from October 1 to December 31, both dates inclusive.

405.601 Return and Payment of Income Tax Withheld on Wages.

Except as provided in 405.602 every person required, under the provisions of section 1622, to deduct and withhold the tax on wages shall make a return and pay such tax on or before the last day of the month following the close of each of the quarters ending March 31, June 30, September 30, and December 31. * * * Such return is to be made on Form W-1, Return of Income Tax withheld on

Wages, and must be filed with the collector of internal revenue for the district in which is located the principal place of business or office of the employer, or if he has no principal place of business or office, then in the district in which is located his legal residence. For quarters commencing after December 31, 1949, Form 941 shall be used in lieu of Form W-1. The return on Form 941 must be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer. * * *

402.609—Records—(a) Records of Employer.

(1) Every employer liable for tax shall keep accurate records of all remuneration (whether in cash or in a medium other than cash) paid to his employees after December 31, 1939 * * *.

Section 29.54-1 of Treasury Regulations 111 provide in part as follows:

* * * The books or records required by this section shall be kept at all times available for inspection by internal revenue officers * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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